KERAJAAN NEGERI TERENGGANU & ORS A

v.

DR SYED AZMAN SYED AHMAD NAWAWI & ORS (NO 2)

B

HIGH COURT MALAYA, KUALA LUMPUR
YEOH WEE SIAM J
[CIVIL SUIT NO: 23 NCVC-106-12/2011]
3 SEPTEMBER 2012

C

CIVIL PROCEDURE: *Action - Capacity to sue - Defamation action - Whether Menteri Besar endowed with capacity to sue for defamation in his official capacity - Public interest considerations*

CIVIL PROCEDURE: *Government proceedings - Liability for acts of public officers - Acts done in good faith when public officer carrying out duties imposed by law - Whether government vicariously liable* D

CIVIL PROCEDURE: *Jurisdiction - High Court - Inherent jurisdiction to hear preliminary issues*

E

TORT: *Defamation - Libel - Whether Menteri Besar endowed with capacity to sue for defamation in his official capacity - Public interest considerations*

The High Court on a preliminary issue raised by the defendants in an earlier proceeding, had ruled that the first plaintiff, being the Trengganu State Government, had no *locus standi* to maintain a defamation action against the defendants. In this current proceeding, the High Court had to determine the preliminary issue of whether the second plaintiff – the Menteri Besar of Terengganu – was suing the defendants in defamation in his official capacity as the Menteri Besar or in his personal capacity, and whether he could maintain the action in either or both capacities. F G

Held (striking out the second plaintiff's claim with costs): H

(1) The High Court would abide with the Supreme Court decision of *Yew Wan Leong v. Lai Kok Chye*, which laid down the established principle that a court could not decide a case outside that which had been made out in the pleadings. I

A However, *Yew Wan Leong v. Lai Kok Chye* was not a decision which limited the High Court's inherent jurisdiction to hear submissions on preliminary issues which had to be decided at the outset of a trial in order that the full trial of the civil suit could be undertaken properly and efficiently, without the court B being unnecessarily bogged down by any claim which could later be proved to be untenable according to law. *Yew Wan Leong v. Lai Kok Chye* (dist). (paras 3 & 4)

(2) Pursuant to ss. 5 and 6 of the Government Proceedings Act C 1956 (Act 359), the Government is vicariously liable for the acts of its public officers (including a Minister or a Chief Minister/Menteri Besar) committed in good faith when carrying out their duties imposed by law. (para 11)

D **(3)** The second plaintiff could maintain the action for defamation if he sued the defendants in his personal capacity. However, the second plaintiff has no legal capacity to sue the defendants in his official capacity as the Menteri Besar of the State of Terengganu. The Menteri Besar, being the chief executive of the State Government and being conferred by E law with the executive authority of the State, should not be allowed to use his official position to sue any member of the public concerning comments on his administration within the State Government. (para 12)

F **(4)** The Menteri Besar, though appointed by the State Ruler, acts in the name and on behalf of the State Government. Since the State Government has no capacity to maintain the action for defamation against the defendants, it follows that the Menteri Besar's position is no different from that of the State G Government. (para 13)

(5) The averments in the statement of claim together with the manner in which the second plaintiff was cited or named in the heading to the civil suit, showed clearly that the second H Plaintiff was maintaining the action in his official capacity as the Menteri Besar of Terengganu. (paras 17-22)

(6) If the second plaintiff had intended to sue the defendants in his personal capacity, he would not have added his official I position in brackets after his name in the heading to the civil

suit. Since he had done so expressly, and by construing this together with all his averments in his statement of claim, the court was satisfied that the second plaintiff had no capacity to maintain the action for defamation in his official capacity. (para 23)

(7) Due to strong public interest considerations, any person, whether a Chief Minister, Minister or Prime Minister may maintain an action for defamation in his personal capacity, but not in his official capacity. To allow such person – for instance the second plaintiff as Terengganu Menteri Besar in the instant case – would intimidate members of the public and strike fear in them, thereby stifling or discouraging constructive public criticism where such criticism is necessary for the public good. Any threat of civil action for libel by a Chief Minister or any other Minster, in an official capacity, would have a "chilling effect" and be detrimental to the constitutional right of freedom of speech in a civil and progressive society. (paras 24 & 25

Case(s) referred to:

City of Chicago v. Tribune Co [1923] 139 NE 86 ***(refd)***

Chin Choon v. Chua Jui Meng [2005] 2 CLJ 569 CA ***(refd)***

Dato' Idris Jusoh v. Dato' Seri Tuan Guru Hj Abdul Hadi Awang & Ors [2004] 4 CLJ 747 HC ***(refd)***

Datuk Seri Utama Dr Rais Yatim v. Amizudin Ahmat [2011] 1 LNS 1441 HC ***(refd)***

Derbyshire County Council v. Times Newspapers Ltd And Others [1993] 1 All ER 1011 ***(refd)***

Hector v. Attorney-General of Antigua and Berbuda [1990] 2 AC 312 ***(refd)***

Lee Kuan Yew v. Jeyaretnam Joshua Benjamin [1990] 1 LNS 78 HC ***(refd)***

Lim Guan Eng v. Utusan Melayu (M) Bhd [2012] 2 CLJ 619 HC ***(refd)***

New York Times Co v. Sullivan [1964] 376 US 254 ***(refd)***

P & A Systech Sdn Bhd v. YAB Dato' Seri Mahdzir Khalid, Menteri Besar Kedah Darul Aman & Anor [2011] 2 CLJ 318 ***(refd)***

Yew Wan Leong v. Lai Kok Chye [1990] 1 CLJ 1113; [1990] 1 CLJ (Rep) 330 SC ***(dist)***

Legislation referred to:

Government Proceedings Act 1956, ss. 2(2), 5, 6(1)

Other source(s) referred to:

Gatley, *Libel and Slander*, 9th edn, 1998, p 173

A *For the 2nd, 3rd & 4th plaintiffs - Abdullah Omar Bawadi; M/s Hisham Sobri & Kadir*
For the defendants - Azhana Mohd Khairudin; M/s Mohamed Hanipa & Assocs

B *Reported by Andrew Christopher Simon*

JUDGMENT

C **Yeoh Wee Siam J:**

Background Facts

[1] Upon the preliminary issues raised by the defendants, on 27 July 2012 this court made the ruling, *inter alia*, that the 1st plaintiff, being the Government of the State of Terengganu ("the State Government"), has no *locus standi* or capacity to maintain the action for the tort of defamation against the defendants. Accordingly, the 1st plaintiff's claim in the writ of summons and the statement of claim was struck out, with no order as to costs (see the court's decision dated 27 July 2012).

Preliminary Issue Regarding The 2nd Plaintiff's Action

[2] Having decided the preliminary issue in respect of the 1st plaintiff, the court ordered both parties to file written submissions regarding the 2nd plaintiff on the next issue, whether the 2nd plaintiff can maintain the action for the tort of defamation against the defendants.

[3] Learned counsel for the 2nd plaintiff submitted that based on the Supreme Court decision in *Yew Wan Leong v. Lai Kok Chye* [1990] 1 CLJ 1113; [1990] 1 CLJ (Rep) 330 at p. 333:

> The Court is not entitled to decide a suit on a matter on which no issue has been raised by the parties. It is not the duty of the Court to make out a case for one of the parties when the party concerned does not raise or wish to raise the point. In disposing of a suit or matter involving a disputed question of fact it is not proper for the Court to displace the case made by a party in its pleadings and give effect to an entirely new case which the party had not made out in its pleadings. The trial of a suit should be confined to the pleas on which the parties are at variance.

[4] I abide by the above decision which lays down the established principle that a court cannot decide a case outside that which has been made out in the pleadings. However, the above case is not a decision which limits this court's inherent jurisdiction to hear submissions on preliminary issues which have to be decided at the outset of the trial in order that the full trial of the civil suit can be undertaken properly and efficiently, without the court being unnecessarily bogged down by any claim which can later be proved to be untenable according to law.

[5] In the present case, even though it was not raised by the defendants in their statement of defence the issue of whether the 2nd plaintiff can maintain the action for defamation against the defendants (which they had done so in the case of the 1st plaintiff), it is incumbent upon this court, after having ruled against the 1st plaintiff for the reasons stated in the decision dated 27 July 2012, and having noted that in the intitulement or heading of the civil suit ("the heading"), the 2nd plaintiff has filed the suit as "Dato' Seri Haji Ahmad bin Said (Menteri Besar Terengganu)", to decide on the crucial preliminary issue whether the 2nd plaintiff is suing the defendants in his official capacity as the Menteri Besar of Trengganu, or in his personal capacity, and whether he can maintain the action in either or both capacities.

The Law

[6] Gatley on *Libel and Slander*, 9th edn 1998 states at p. 173 as follows:

> An action for defamation is purely a personal action. The proper person to sue as plaintiff is the person defamed, and the proper person to be sued as defendant is the person who published the defamatory words …

[7] Based on the above, it is clear that the 2nd plaintiff can maintain the action for defamation if he sues the defendants in his personal capacity.

[8] There appears to be no direct authority on the question whether the 2nd plaintiff can sue the defendants for defamation in his official capacity as the Menteri Besar of Terengganu.

[9] Under s. 5 of the Government Proceedings Act 1956 (Act 359), the government shall be liable for any wrongful act committed by any public officer committed in good faith when acting in pursuance of a duty imposed by law. The definition of "officer" in s. 2(2) of Act 359 includes a minister of the "government". The term "government" has been defined to include the Federal Government and the Government of the States.

[10] Under s. 6(1) of Act 359, no proceedings shall lie against the government under s. 5 of the same Act unless proceedings for damages for such wrongful act would have lain against such officer personally.

[11] Upon reading s. 5 and 6 of Act 359 together, it can be concluded that the government would be vicariously liable for the acts of its public officers (including a Minister, or a Chief Minister/ Menteri Besar) committed in good faith when carrying out their duties imposed by law.

[12] Following the rationale in my decision dated 27 July 2012 that the State Government cannot maintain the action for defamation against the defendants, it also means that by applying the same rationale, the 2nd plaintiff has no capacity, according to law, to sue the defendants in his official capacity as the Menteri Besar of the State of Terengganu. This is premised on the fact that the Menteri Besar, being the chief executive of the State Government, and being conferred by law with the executive authority of the state, should not be allowed to use his official position to sue any member of the public regarding any question or comment raised regarding his administration within the State Government.

[13] The Menteri Besar, even though he is appointed by the State Ruler, acts in the name and on behalf of the State Government. Since the State Government has been held to have no capacity to maintain the action for defamation against the defendants, it follows that the position of the Menteri Besar is no different from that of the State Government.

[14] The court would now determine the issue of whether the 2nd plaintiff is maintaining the action as a Menteri Besar, or in his personal capacity.

Whether The Pleadings Show That The 2nd Plaintiff Is Suing In His Official Or Personal Capacity

[15] The only reference in the statement of claim ("SOC") to the 2nd plaintiff being an individual is found in para. 2 where it is stated:

> Plaintiff Ke-2 adalah merupakan seorang individu dan memegang jawatan sebagai Menteri Besar Terengganu dan mempunyai alamat untuk penyampaian di Tingkat 16, Wisma Darul Aman, Pejabat Menteri Besar Terengganu …

[16] However, para. 2 only states that the 2nd plaintiff is an individual, ie, an individual person, as opposed to a government (as in the case of the 1st plaintiff), or a corporation.

[17] Other than para. 2, the court finds that the other paragraphs in the SOC are averments by the 2nd plaintiff in his official capacity as Menteri Besar. This can be clearly seen in paras. 27 (a) to (i), and para. 31 as follows:

> Dalam maksudnya yang asal dan biasa, perkataan-perkataan dan/atau kenyataan-kenyataan yang terkandung di dalam Artikel Fitnah tersebut adalah bermaksud dan/atau difahami bermaksud bahawa:
>
> (a) Plaintif Pertama dan Plaintif Ke-2 tidak telus dalam pemberian kontrak membekalkan pakaian dan alatan sekolah di bawah Program Bantuan Pakaian dan Alatan Sekolah tersebut;
>
> (b) Plaintif Pertama dan Plaintif Ke-2 telah salah urus kontrak dan/atau Program Bantuan Pakaian dan Alatan Sekolah tersebut;
>
> (c) Plaintif Pertama dan Plaintif Ke-2 telah secara salah mendapatkan keuntungan yang besar daripada Program Bantuan Pakaian dan Alatan Sekolah tersebut;
>
> (d) Plaintif Pertama dan Plaintif Ke-2 telah menyelewengkan Program Bantuan Pakaian dan Alatan Sekolah tersebut yang sepatutnya diberikan kepada pelajar-pelajar miskin di negeri Terengganu yang berkelayakan;
>
> (e) Plaintif Pertama dan Plaintif Ke-2 telah menipu pelajar-pelajar miskin di negeri Terengganu berkenaan Program Bantuan Pakaian dan Alatan Sekolah tersebut;

(f) Plaintif Pertama dan Plaintif Ke-2 telah bertindak demi kepentingannya sendiri tanpa mengambil peduli kebajikan pelajar-pelajar miskin di negeri Terengganu;

(g) Plaintif Pertama dan Plaintif Ke-2 bukanlah seorang Menteri Besar dan/atau sebuah kerajaan negeri yang efisien dalam menguruskan hal ehwal pentadbiran, ekonomi dan pembangunan negeri Terengganu;

(h) Plaintif Pertama dan Plaintif Ke-2 adalah seorang Menteri Besar dan/atau sebuah kerajaan negeri yang tidak bertanggungjawab, tidak amanah dan tidak boleh dipercayai;

(i) Plaintif Pertama dan Plaintif Ke-2 adalah seorang Menteri Besar dan/atau sebuah kerajaan negeri yang tidak layak untuk mentadbir negeri Terengganu;

(j) Plaintif Ke-3 dan Plaintif Ke-4 telah bersubahat dan bersekongkol dengan Plaintif Pertama dan Plaintif Ke-2 berkenaan Program Bantuan Pakaian dan Alatan Sekolah tersebut; and

31. Penerbitan perkataan-perkataan dan/atau kenyataan-kenyataan yang tidak benar dan/atau berniat jahat dan/atau berunsur fitnah yang terkandung di dalam Artikel Fitnah yang diterbitkan di dalam akhbar Harakah *telah menjejaskan reputasi dan nama baik Plaintif Pertama sebagai sebuah kerajaan yang mentadbir negeri Terengganu dan/atau Plaintif Ke-2 yang merupakan Menteri Besar Terengganu yang bertanggungjawab untuk membela nasib rakyat negeri Terengganu* dan atau sifat, kredit dan operasi Plaintif Pertama dan Plaintif Ke-2 telah dibawa ke skandal, keaiban dan penghinaan awam dan telah menanggung malu, derita dan kerugian. (emphasis added)

[18] The above averments, fortified by the fact that in the heading to the civil suit, the 2nd plaintiff is cited as "Dato' Seri Haji Ahmad bin Said (Menteri Besar Terengganu)" show clearly that the 2nd plaintiff is maintaining this action in his official capacity as the Menteri Besar of Terengganu. The following are my reasons:

(1) In paras. 27(a) to (f) of the SOC, the 2nd plaintiff is always cited together the 1st plaintiff (which is the State Government), ie, "plaintif pertama dan plaintif ke-2". This clearly shows that the 2nd plaintiff is suing the defendants in his official capacity, together with the State Government.

(2) In paras. 27(g), (h) and (i) of the SOC, it is shown even more expressly that the 2nd plaintiff is suing the defendants in his official capacity:

> … Plaintif Ke-2 bukanlah seorang Menteri Besar … yang efisien … (see para. 27(g));
>
> … Plaintif Ke-2 adalah seorang Menteri Besar yang tidak bertanggungjawab … (see para. 27(h)); and
>
> … Plaintif Ke-2 adalah seorang Menteri Besar … yang tidak layak untuk mentadbir negeri Terengganu; (see para. 27(i)).

(3) In para. 31, it is made most explicit, and in fact amplied, that the 2nd plaintiff is suing the defendants in his official capacity. This can be seen from the words used "... Plaintif Ke-2 yang merupakan Menteri Besar Terengganu …".

(4) If indeed the 2nd plaintiff is suing the defendants in his personal capacity, he would not in the first place state his position, "(Menteri Besar Terengganu)", below his name in the heading to the civil suit.

[19] Throughout the averments, the 2nd plaintiff had always referred to the 1st plaintiff (which is the State Government of Terengganu) and then to himself, which proves that he is maintaining the action in his official capacity, acting together with, or on behalf of, the 1st plaintiff.

[20] Learned counsel for the 2nd plaintiff cited the following cases to show that the plaintiff or defendant in those cases could sue, or were sued, as the case may be, for defamation in their official capacity. However, with respect I do not agree that the respective plaintiffs in those cases were suing in their official capacity:

(i) *Dato' Idris Jusoh v. Dato' Seri Tuan Guru Hj Abdul Hadi Awang & Ors* [2004] 4 CLJ 747:

> Defendan Pertama adalah Menteri Besar Terengganu dan Presiden Parti Islam SeMalaysia (PAS).

In my view, this case is not applicable here because it is regarding the 1st defendant being sued as a Menteri Besar. It is not regarding him suing as a plaintiff, as in the present case.

Be that as it may, as I had stated earlier in this decision, a Menteri Besar can be sued in his official capacity and the State Government can be vicariously liable for his wrongful acts committed in the course of performing his legal duties (see s. 5 and 6(1) of Act 359).

(ii) *P & A Systech Sdn Bhd v. YAB Dato' Seri Mahdzir Khalid, Menteri Besar Kedah Darul Aman & Anor* [2011] 2 CLJ 318:

Here again the case would not apply to the present case since the 1st defendant was then the Menteri Besar of Kedah. My above views regarding *Dato' Idris Jusoh* (*supra*) would apply as well.

(iii) *Lim Guan Eng v. Utusan Melayu (M) Bhd* [2012] 2 CLJ 619, where at the material time the plaintiff was the Chief Minister of Penang, the Member of Parliament for the Began Parliamentary constituency and the State Assembly Member for the State Constituency of Air Puteh. The plaintiff was also the Secretary-General of the Democratic Action Party (DAP).

In my view, *Lim Guan Eng* (*supra*) ought to be distinguished from the present case. Nowhere in that case is it stated that the plaintiff was suing the defendant in his official capacity as the Chief Minister of Penang. The position of Chief Minister is not stated in brackets below the plaintiff's name in the heading to that civil suit. The averments on his various positions only show that the plaintiff was at the material time holding various positions amongst which include the position of Chief Minister. In that case too, the issue was never raised on whether the plaintiff was suing in his official capacity or personal capacity. Without any reference of suing in his official capacity, especially as can be seen in the heading to the civil suit, by the mere citation of his name only, but not his position as Chief Minister, it is implicit that the plaintiff was maintaining the action for defamation in his personal capacity.

(iv) Similarly in *Datuk Seri Utama Dr Rais Yatim v. Amizudin Ahmat* [2011] 1 LNS 1441, the issue was never raised on whether the plaintiff was suing in his official or personal capacity. What is to be noted is that the position as Minister was not stated in brackets at the heading of the civil suit below the

name of the plaintiff, as was done in this case. There is no doubt that in the judgment, the learned judge referred to the plaintiff as a senior politician, a qualified lawyer, a member of Parliament of Jelebu, and at the material time a Minister in the cabinet, but it is clear that the learned judge did not have to deal with the issue whether the plaintiff was suing in his official or personal capacity. By the very fact that the plaintiff was cited in his personal name, without any reference to his position as a Minister, it is implicit that he was suing in his personal capacity even though he was holding the position of a Minister.

(v) In *Lee Kuan Yew v. Jeyaretnam Joshua Benjamin* [1990] 1 LNS 78, the plaintiff did not state in brackets in the heading to the civil suit, below his name, his position as the Prime Minister of Singapore. Neither was it raised in the case the issue of whether he was suing in his official or personal capacity. Therefore, here again, it is implicit that the plaintiff, even though he was then the Prime Minister of Singapore, was maintaining the suit for defamation in his personal capacity.

(vi) *Chin Choon v. Chua Jui Meng* [2005] 2 CLJ 569 where the Minister was the defendant. My view on this case is the same as my reasoning given for *Dato' Idris Jusoh* (*supra*) and *P & A Systech Sdn Bhd* (*supra*).

[21] From the above authorities, it is observed that nowhere was it stated that the respective plaintiff was suing in his official capacity. In none of the cases, was the plaintiff cited in the heading to the civil suit with his official position stated in brackets below the name of the plaintiff. In addition to this, in none of the above cases, was the plaintiff suing as a co-plaintiff with the government. This, therefore, fortifies my finding that the 2nd plaintiff in the present case is, without doubt, maintaining the suit in his official capacity when he stated his position as the Menteri Besar of Terengganu after his name in the heading, and in the manner that he worded his averments in his statement of claim.

[22] It is trite practice and procedure that when a person sues another person in his personal capacity, there is no necessity or requirement that he states his position/capacity in brackets below his name as the plaintiff. However, if he is suing in a specific

capacity, other than in his personal capacity, then he has to state such capacity in brackets below his name, eg, in the case of the 3rd and 4th plaintiffs in the present case, the words "(trading as Hanie Enterprise)" are stated below their respective names to indicate that they are suing in their trading or business capacity.

[23] If the 2nd plaintiff had intended to sue the defendants in his personal capacity, he would not have added his official position in brackets after his name in the heading to the civil suit. Since he had done so expressly, and by construing this together with all his averments in his statement of claim, the court is satisfied that the 2nd plaintiff has no capacity to maintain this action for defamation in his official capacity. To allow him to do so would be contrary to the rationale and the principles which I had laid down and applied from the House of Lords case in *Derbyshire County Council v. Times Newspapers Ltd And Others* [1993] 1 All ER 1011 (see my decision dated 27 July 2012).

Conclusion

[24] In conclusion, due to strong public interest considerations, this court is of the opinion that any person, whether he is a Chief Minister, Minister or Prime Minister or any other person in a government executive position, can maintain an action for defamation in his personal capacity, but not in his official capacity. To allow such person (in this case, the 2nd plaintiff as the Menteri Besar of Terengganu) to do so would tantamount to intimidating members of the public and striking fear in them, thereby stifling or discouraging constructive public criticism or question of government administration in situations where such criticism or question is necessary for the public good (see also the decision of the Supreme Court of Illinois in *City of Chicago v. Tribune Co* [1923] 139 NE 86 which was cited in *Derbyshire* (*supra*), and the decision of the Supreme Court of the United States in *New York Times Co v. Sullivan* [1964] 376 US 254, 277, and the decision of the Judicial Committee of the Privy Council in *Hector v. Attorney-General of Antigua and Berbuda* [1990] 2 AC 312 which cases, though not binding precedents, are rather persuasive authorities).

[25] Any threat of civil action for libel by a Chief Minister or any other Minister, in the official capacity, would have a "chilling effect" and be detrimental to the constitutional right of freedom of speech in a civil and progressive society.

Court's Ruling

[26] Therefore, in view of my finding that the 2nd plaintiff did not sue in his personal capacity, but in his official capacity, on 28 August 2012, I ruled that the 2nd plaintiff cannot be allowed to maintain his action against the defendants for defamation. Accordingly, the 2nd plaintiff's claim in the writ of summons and the statement of claim is struck out. Costs of RM5,000 are to be paid by the 2nd plaintiff to the defendants within 14 days from the date of this order.

[27] In the case of the 1st plaintiff, in my decision dated 27 July 2012, I did not order costs against the State Government of Terengganu since that decision involves a novel point which has not been tested or decided before.